IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2611 OF 1994

Shri Sunil Shamrao Jadhav
and Others .. Petitioners.
Vs.
The Kolhapur Municipal
Corporation & Others .. Respondents.

WITH

WRIT PETITION NO.3685 OF 1994

Shri Shrikant Vasantrao
Angapurkar & Others .. Petitioners.
Vs.
The Kolhapur Municipal
Corporation & Others .. Respondents.

WITH

WRIT PETITION NO.747 OF 1995

Municipal Transport
Worker's Union .. Petitioners.
Vs.
The Kolhapur Municipal
Corporation and Others .. Respondents.

W.P.No.2611/94
Shri N.Y.Bandiwadekar for the petitioners.
Shri D.S.Sawant for respondent nos.2 and 3.
Shri A.Y.Bukhari with Shri M.S.Topkar with Shri Umesh Nabar with Shri Burhari Bukhari for respondent no.4.

W.P.No.3685/94
Shri N.Y.Bandiwadekar for the petitioners.
Shri D.S.Sawant for respondent nos.2 and 3.
Shri A.Y.Bukhari with Shri M.S.Topkar with Shri Umesh Nabar with Shri Burhari Bukhari for respondent no.4.

W.P.No.747/95

Shri A.Y.Bukhari with Shri M.S.Topkar with Shri Umesh Nabar with Shri Burhari Bukhari for the petitioners.
Shri D.S.Sawant for respondent nos.2 and 3.
Shri N.V.Bandiwadekar for respondent nos.4 to 11 and 13 to 16.
Shri K.K.Tated for respondent nos.19 to 22.
W.P. is dismissed against respondent no.12.

CORAM : B.H.MARLAPALLE & D.B.BHOSALE, JJ.
DATED : APRIL 27, 2006.

ORAL JUDGMENT: (PER B.H.MARLAPALLE, J.)

. In the first petition there were 10 petitioners and we are now informed that petitioner no.5 - Pratap Ambaji Bodekar is no more in service of the Corporation and petitioner no.8 - Ramchandra Shivajirao Chavan died during the pendency of this petition and, therefore, the petition survives for the remaining eight petitioners. Petition No.3685 of 1994 is filed by three persons. All these eleven petitioners claim that they had undergone the selection process for the post of Assistant Traffic Inspector (hereinafter referred as "A.T.I." for short) pursuant to the advertisement published in the local newspaper on 12.10.1992 by the Commissioner or the Transport Manager, Kolhapur Municipal Corporation Transport, Kolhapur, an undertaking of Kolhapur Municipal Corporation and they were issued appointment orders on or about 24.7.1993. However, when they went to report for

duty they were not allowed to join on or about 26.7.1993. They submitted a representation on or about 19.5.1994 as well as 26.2.1994 to the Commissioner but they were not successful in joining the post of concerned Traffic Inspector. Hence they approached this Court on or about 4th July, 1994 i.e. after one year of the date of appointment orders being issued. The Division Bench of this Court while granting Rule by its order dated 21.7.1994 was pleased to order the interim relief in terms of prayer clause (c) but without prejudice to the rights and contentions of the 4th respondent and the 4th respondent is a recognised union, namely, Municipal Transport Worker's Union. Consequently, the petitioners were allowed to join in the post of A.T.I. under the Kolhapur Municipal Transport with all consequential service benefits.

2. Respondent no.4 - union (hereinafter referred as "recognised union" for short) has also filed Writ Petition No.747 of 1995 and challenged the appointments of the very same petitioners in writ petition nos.2611/94, 3685/94 and 4082/94. We shall deal with writ petition No.4082/94 separately and a little later.

3. Kolhapur Municipal Corporation came to be established in the year 1971-72 by the conversion of Kolhapur Municipal Council. However, the Municipal Council had a separate transport establishment by the name Kolhapur Municipal Transport and the said establishment continued to be run by the Corporation as well, as its undertaking. The service conditions of the employees of Corporation as well as the transport undertaking are governed by the regulations framed under the Bombay Provincial Municipal Corporation Act, 1949 ("the Act" for short). An advertisement was published by the Kolhapur Municipal Transport in the local newspaper on 12.10.1992 inviting applications for 16 posts of A.T.I. and 6 of them were reserved for the backward classes whereas the remaining 10 were meant to be filled in by the open category candidates. The unrevised pay scale of the posts was Rs.335-15-500-20-580-30-620. The experience and qualification for eligibility of the said posts were described as under in the same advertisement: (a) the age limit - 28 years and relaxation by 5 years for the candidates from reserved category; (b) Bachelor’s degree of a recognised university; and (c) 5 years work experience of a transport undertaking.

3.1. It appears that the Corporation received in all about 175 applications in response to the said advertisement. The interviews and other formalities were completed and on 19.7.1993 an approval was granted by the resolution of the standing committee of the Corporation for the appointment of 15 candidates to the post of A.T.I. and 5 of them were from the reserved category whereas remaining 10 were from the open category. It was further resolved to appoint the said 15 candidates on probation for a period of one year. Consequently, the appointment letters were issued for the post of A.T.I. in the unrevised pay scale of Rs.365-620 which was converted to revised pay scale of Rs.1280-2300. It appears that when the petitioners went to report for duty on 26.7.1993 they were not allowed to join the duties and purportedly on account of the strike. However, the transport committee of the Kolhapur Municipal Transport passed the resolution and stayed the earlier decision to appoint the petitioners on account of the agitations resorted to by the members of the recognised union. Consequent to the interlocutory order of this Court the petitioners are in service with so called all the benefits. It has been further pointed out that four more posts of A.T.I. have been filled in on the basis of

contractual appointments of one year as trainees and to fill the reserved category backlog. These appointments are as trainees have been made on consolidated monthly salary of Rs.3,900/-. In the first two petitions the main relief prayed for is to issue orders/directions to the respondents that the petitioners be allowed to work in the post of A.T.I. pursuant to the appointment orders issued in their favour on 24.7.1993 w.e.f. 26.7.1993 and all other consequential benefits including the arrears of salary, seniority promotion etc.

4. The respondent - recognised union on the other hand has contended that none of these petitioners were qualified for their appointment to the post of A.T.I. and they did not possess the qualifications necessary for the posts other than those specified in section 457(3)(a), of the Act. The union further claims that none of the petitioners met the requirements of experience as set out in the service regulations for the post of A.T.I. and hence their selection was totally illegal. It was further alleged that the petitioners were granted special favour though they were not eligible even for any call for the interview as none of them fulfilled the eligibility terms of experience. As per the union the posts of

A.T.I. were to be filled in the ratio of 75% and 25% i.e. 75% posts to be filled in by promotion from the existing employees of the Kolhapur Municipal Transport and remaining 25% to be filled by nominations and in both the cases it was necessary to have the prescribed qualification and experience as well. The union has gone to the extent of making allegations of extraneous considerations or granting undue favour to the petitioners by issuing the appointment orders, in July 1993. On behalf of the respondent-Corporation, affidavits have been filed. We, therefore, called upon the Commissioner of Kolhapur Municipal Corporation to remain present before us so as to furnish upto date information regarding the service rules/conditions as amended from time to time, including the total sanctioned strength and present vacancies. It was only thereafter that affidavit in reply has been filed and it has been pointed out that the total cadre strength of A.T.I. at present is 25 and the ratio of 75% and 25% is required to be followed in filling in the posts from amongst the internal candidates by promotion and as well as outside candidates by nomination. It has been further pointed out that the rules of reservation as made applicable by the State Government also apply, to

fill in these posts and, therefore, in case the petitioners' appointments are held to be illegal, while filling the vacant posts regards must be had to the rule of reservation, quota by promotion and nomination for the total cadre strength of 25 ATIs.

5. Mr.Bandiwadekar, the learned counsel for the petitioners invited our attention to the eligibility requirements set out under Regulation 1 of 16.4.1974 of the Corporation and submitted that the said service regulation framed under section 465(a) of the Act were purportedly prescribing the qualifications required, for appointment to the posts in Municipal service other than those specified in sub-clause (a) of clause (3) of section 457 and submitted that these rules cannot be made applicable to the appointment of the petitioners as all of them are appointed on the basic salary in excess of Rs.400/- per month and thus they were not covered within the ambit of section 53(1) of the Act and consequently regulation no.1 dated 16.4.1974 did not cover the appointments of the petitioners. These submissions to say the least, are fallacious. Section 55 of the Act states that nothing in section 51, 52, 53 shall apply to the officers and servants appointed under the provisions of Chapter XX which pertains

to the transport undertaking. The operation of the Undertaking and Construction and Maintenance of Works are covered under the said chapter. As per section 349 of the Act, subject to the provisions of sections 347 and 348, the power of appointing municipal officers and servants for the purposes of the Transport Undertaking shall vest in the Transport Manager if the minimum monthly salary, exclusive of allowance, is less than Rs.200/- and in the Transport Committee in all other cases. Section 465 of the Act deals with the regulations and sub-section (1)(a) of the said section states that the Standing Committee shall, from time to time, frame regulations not inconsistent with this Act and the rules but in consonance with any resolution that may be passed by the Corporation prescribing the qualifications required, for appointments to the posts in the municipal service other then specified in sub-clause (a) of sub-section (3) of section 457. Under sub-clause (a) of sub-section (3) of section 465 it is stipulated that no regulation under sub-section (1) or under clause (a) of section 2 shall have effect until it has been confirmed by the Corporation and, if made under clause (h) of sub-section (1), until it has in addition been confirmed by the State Government. Whereas sub-section (4) of section 465

states that the words "Standing Committee" will have to be read as "Transport Committee" under Chapter XX for the purpose of Kolhapur Municipal Transport.

6. There is no difficulty in accepting this proposition that the post of ATI falls within the ambit of section 53 and sub-clause (a) of sub-section (3) of section 457 of the Act. Their selections and appointments consequent to the selection process based on the advertisement released on 12.10.1992 shall have to be tested based on Regulation No.1 dated 16.4.1974 and framed under section 465 (a) of the Act prescribing the qualifications required to be applied in the post. As per regulation no.3 qualifications, age and experience necessary for the appointments to the posts in the Municipal services shall be as prescribed in column 3 of the Schedule "A" attached to these regulations provided that the Corporation may relax the educational qualifications in the case of deserving more experienced candidates already working in the Corporation by promotion to the upto the cadre of Superintendents only in non-technical posts. However, such relaxation shall not exceed 50% of the posts to be appointed in respect of appointment by promotion to the posts

of Senior Clerks. It is further provided that the qualification regarding experience/higher basic academic qualification is relaxable at the discretion of the competent authority in the case of candidates belonging to the Scheduled Caste, Scheduled Tribes and Denotified Tribes/Nomadic Tribes, if at any stage of selection, the candidates from these communities possessing the requisite experience/higher basic academic qualification are not likely to be available to fill up the vacancies reserved for them. Regulation No.4 has prescribed the age limit and relaxation by five years in case of candidates belonging to Schedule Caste or Scheduled Tribe and further relaxation of not more than 10 years has been provided to the Corporation in case of deserving and more experienced candidates. As per Regulation 5(a) if the number of posts in the cadre is only one the appointment shall ordinarily be made by promotion and 5 (b) provides for promotion by 75% quota and nomination for remaining 25% quota. Regulation 6 states that in the event of an appointment by promotion, if no candidates are found suitable for such promotion the appointment may be made by nomination provided that before taking recourse to nomination in such cases the reasons for not making the appointment by promotion

shall be recorded in writing by the appointing authority. There was a meeting between the transport committee and its office bearers and a settlement came to be signed under section 2(p) read with section 18(1) of the Industrial Disputes Act, 1947 and Rules 62(4) of the Industrial Disputes (Bombay) Rules, 1947 and Schedule "A" to the extent of qualifications for the post of A.T.I. came to be amended so as to set out the separate educational qualifications for promotions and for nominations. The present petitioners, as noted earlier, have been appointed by nomination on these posts. As per the recognised union these amended provisions have a statutory force and they are binding on the Kolhapur Municipal Transport as well as the union, and therefore the settlement was signed between the parties, adopting the said amended qualifications. So far as the qualifications for the posts to be filled in by nomination, the eligibility requirements have been set out as : (a) age - 28 years with relaxation of 5 years in case of employees of the Corporation (b) Bachelor’s degree from a recognised university and (c) 5 years experience with the transport undertaking. The said qualifications were incorporated in the advertisement published by the Kolhapur Municipal Transport on 12.10.1992 and in

response to which the petitioners had applied.

7. All the petitioners have furnished their credentials at Exhibit "A" collectively to the petition memo and we have noted that though all of them possessed a bachelor's degree and some of them came from the reserved categories, none of them had any experience, leave alone 5 years experience of having worked in the transport undertaking. This fact has not been disputed by any of the parties to the petitions. Thus all of them were not even eligible to apply for the post of A.T.I. in response to the subject advertisement. From the Regulations we have also noted that the post of A.T.I. is above the post of Controller and Head driver. The pay scale for the post of conductor in unrevised pay scale is Rs.65-5-100-EB-10-190 and that of Driver is Rs.70-3-110-EB-10-190. The pay scale of Controller is 90-5-120-EB-10-210 when the regulations were framed in the year 1974. It is also noticed that the post of A.T.I. is to be filled in by the promotion from the employees holding the post of controller continuously for a period 5 years and are senior and efficient. We have referred all these details only to point out that the post of A.T.I. under no circumstances could have been offered to the fresh graduates

coming from the university. It is surprising that the standing committee of the Corporation approved the appointments of the petitioners for the post of ATI and none of them possessed work experience and the transport committee in response to the agitation resorted to by the recognised union rightly intervened. We have also noted from the record that the Commissioner/General Manager has recorded his opinion against the decision of the standing committee. The selection and appointments of the petitioners were thus illegal as none of them fulfilled the condition of work experience and the standing committee had no powers to relax that requirement in respect of the petitioners. The Corporation as well as Kolhapur Municipal Transport rightly sought to review the earlier decision which culminated in the issuance of the appointment orders in favour of the petitioners on or around 24th September, 2003. They approached this Court in the instant petition and were directed to be allowed to join in the post of ATI. There was no reason for the petitioners being appointed to the said post of ATIs for which they were disqualified when the advertisement was released and hence even if they have worked for all these years on account of the interim order passed by this Court, that by itself will not be sufficient to protect their

appointment which is per se illegal void abinitio In any case, this Court while granting interlocutory order also clarified that the said relief was subject to the rights and contentions of the respective authorities. In the case of **State of Punjab Vs. Jagdip & Others 1964 (4) SCR 964** a Constitution Bench stated,

> "in our opinion where a Government servant has no right to a post or to a particular status though an authority under the Government acting beyond its competence had purported to give that person a status it was not entitled to give, he will not in law be deemed to have been validly appointed to the post or given the particular status."

Similarly in the case of **R.N.Nanjundappa Vs. T.Thimmaiah & Anr. AIR 1972 SC 1767** it has been stated,

> "If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularised".

8. Mr.Bandiwadekar, the learned counsel for the petitioners referred to the following decisions before us to protect the appointment of the

petitioners on the grounds of equity and hardships: **(1) Smt.Rekha Chaturvedi V. University of Rajasthan & Others (1993) 25 ATC 234; (2) Dr.M.S.Mudhol and Anr. Vs. Shri S.D.Halegkar and Others 1993(4) SLR 364; (3) Roshni Devi and Others Vs. State of Haryana and Others 1999 SCC (L&S) 103 (4) Basant Kumar Sarkar & Others Vs. Eagle Rolling Mills Ltd. and Others AIR 1964 SC 1260.** In short, it was submitted by Mr.Bandiwadekar that the petitioners were working for more than 10 years and they should not be unseated from the post now and in any case by now they have acquired the experience for 5 years and thus fulfil the conditions regarding the eligibility criteria. We do not agree with these submissions. When the Court is approached for relief by way of a writ, the Court has necessarily to ask itself whether the person before it had any legal right to be enforced. The Court must recognise that an appointment to a post in the Government service or in the service of its instumentalities, can only be by a way of a proper selection in the manner required by the rules. The Constitution Bench in the case of **Dr.Rai Shivendra Bahadur (1962 Supp. 2 SCR 144)** held that in order that a mandamus may issue to compel the authority to do something it must be shown that the Statute imposes a legal duty

on the authority and the aggrieved party had a legal right under the Statute or rule to enforce it.

9. If the petitioners were not qualified to apply for being selected for the post of A.T.I. right in the beginning their appointment which was mainly based on an interlocutory order passed by this court cannot be recognised as legal now only because now they worked in the said post during the last about ten years. In this regard reliance was placed in the case of **N.Mohanan V. State of Kerala AIR 1997 SC 1896**. Their Lordships while referring to the reliance placed on the interlocutory order noted thus "It is then contended that even though the petitioner has no right to be appointed since he was appointed on the basis of the order of the Court provisionally, the appointment already made should be allowed to be continued and should be regularised. The High Court has negatived this contention, and in our view rightly. The interim order is subject to result or outcome of the final adjudication. If the petitioner is not successful in the final decision, the interim order would stand set aside. So appointment by the interim order does not create any right nor the petitioner gets any right to regularisation on that basis." In

the case of **State of Rajasthan Vs. Hitendra Kumar Bhatt 1997 II CLR 478** similar proposition has been reiterated by the Apex Court and we reproduce the following observations:

> "As it was on account of the interim orders which were obtained by the respondent that he was given appointment and continued. He was aware that his appointment was subject to the outcome of this petition. One cannot, therefore, take too sympathetic a view of the situation in which the respondent finds himself. A cut off date by which all the requirements have to be met, cannot be ignored in an individual case. There may be other persons who have applied had they known that the date of acquiring qualifications was flexible. They may not have applied because they did not possess the requisite qualification on the prescribed date. Relaxing the prescribed requirements in the case of an individual may, therefore, cause injustice to others."

In the case of **Subedar Singh and Others Vs. District Judge, Mirzapur and Anr. 2001 Lab.I.C. 64** the Apex Court stated that "When the appointment to the posts in question is governed by a set of

statutory rules, it is unthinkable that the District Judge would adopt this extra constitutional method of appointment and that also, by maneuvering and by deputing the copyists to do some other job and replace them by fresh recruits. The so called Regularisation Rule, in our opinion, does not intend to regularise the services of the illegal and irregular recruits like the appellants. In the case of **State of H.P. Vs. Suresh Kumar Verma and Anr. AIR 1996 SC 1565** the Apex Court stated,

> "Relaxation in our considered opinion is not and cannot be the mode of recruitment by any "State" within the meaning of Article 12 of the Constitution of India or any body or authority governed by a Statutory Act or the Rules framed thereunder. It is also now well settled that an appointment made in violation of the mandatory provisions of the Statute and in particular ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation."

In **Nanjundappa's** case (supra) it was further held,

> "Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules".

. This view was followed with approval by a three Judges bench of the Supreme Court in the case of **B.N.Nagarajan and Others Vs. State of Karnataka AIR 1979 SC 1676.**

10. Having regard to the well settled position in law on the point of regularisation of the service of the illegal appointees, we have no other option but to reject the contentions of the learned counsel for the petitioners to continue the petitioners or regularise their service on the ground that they have put in 10 years of service and incurred number of financial liabilities etc. All these considerations are germane only when the appointments was in keeping with the statutorily

framed rules/regulations.

11. In the premises the petitions filed by the appointees fail and they are hereby dismissed. Rule discharged. Interim order stands vacated. Writ Petition No.747 of 1995 succeeds partly, by setting aside the appointments of the petitioners in the first two petitions. These appointments are hereby declared as illegal and they stand set aside.

12. As noted earlier the Commissioner of the Kolhapur Municipal Corporation has filed an affidavit pointing out that as at present the total cadre strength of A.T.I. is 25 and, therefore, 19 posts are required to be filled in by promotion and remaining 6 posts are available for recruitment by nominations. The petitioners are now eligible to apply for the post of A.T.I. having obtained more than 5 years experience in Kolhapur Municipal Transport undertaking and pursuant to the interlocutory order passed by this Court. However, it is possible that some of them or all of them have crossed maximum age limit to fill in the remaining vacancies that may occur in the undertaking. The Corporation will have to follow the ratio of 75% by promotion and 25% by nomination

as well as the rule of reservation as has been adopted by the respondent, pursuant to the State Government policy. The Corporation shall take due steps within three months from today to commence the process for filling in the posts by nomination which may be 6 or more and the petitioners are at liberty to compete to such open quota of direct recruits from the open or reserved category candidates and we clarify that in case they have crossed the maximum age limit, the same shall not be held against them in the selection process and we clarify further that selection should be strictly on merits and by following the regulations. So far as the remaining posts available for promotion are concerned the Commissioner/General Manager shall take similar steps to fill in vacant posts on the same lines as noted hereinabove and by following the regulations. We also make it clear that the deserving candidates who were eligible for promotion in the selection process which has been set aside by us, shall be granted concession in the requirement of maximum age. Needless to mention, reservation shall be based on the total cadre strength of 25 posts as at present.

13. At this stage the learned counsel for the

petitioners in the first two petitions submitted an oral application praying for stay of this order and the said prayer is opposed by the learned counsel for the recognised union. We hereby stay the operation of this order for a period of four weeks.

14. Certified copy be issued to the parties on out of turn basis.

15. A copy of this judgment be forwarded to the Principal Secretary - Department of Urban Development, Maharashtra so as to request the State Government for considering a suitable amendment to section 53 of the Bombay Provincial Municipal Corporation Act, 1949.

(D.B.BHOSALE, J.) **(B.H.MARLAPALLE, J.)**